AMERICAN BANKRUPTCY INSTITUTE

2017 Hon. Steven W. Rhodes Consumer Bankruptcy Conference

Representing Secured Creditors in Chapters 7 and 13

CONCURREMT SESSION

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ELGA Credit Union; Burton, Mich.

2017

Hon. Steven W. Rhodes Consumer Bankruptcy Conference

Presented by the American Bankruptcy Institute and the Consumer Bankruptcy Association for the Eastern District of Michigan

REPRESENTING SECURED CREDITORS IN CHAPTER 7 AND 13 CASES

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I. AUTOMATIC STAY ISSUES FOR SECURED CREDITORS

A. Filing a Petition Triggers the Automatic Stay - 11 U.S.C. §362(a)

The Bankruptcy Code, 11 U.S.C. §362(a), provides that the filing of a bankruptcy petition operates as a stay, applicable to all entities, of –

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
> (4) any act to create, perfect, or enforce any lien against property of the estate;
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
> (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
> (8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is

> an individual for a taxable period ending before the date of the order for relief under this title.

The automatic stay has three basic purposes: (1) provide the debtor a breathing spell from creditors to stop all collection activities; (2) protect creditors from each other by stopping the pursuit of the debtor's assets and preserving the assets for the benefit of all creditors; and (3) provide for an order liquidation or administration of the estate. *Cowin v. Countrywide Home Loans (In re Cowin)*, 864 F.3d 344 (5th Cir. 2017).

The automatic stay protects the debtor (§362(a)(1)(2)(6)(7)(8)), the exempt property of the debtor (§362(a)(5)), and the property of the estate(§362(a)(2)(3)(4)). To determine what property constitutes "property of the estate" review 11 U.S.C. §§541 and 542. For Chapter 13 cases, look at §1306.

The automatic stay under §362(a)(1) generally applies only to the debtor and does not apply to non-filing co-debtors or guarantors, with the exception of 11 U.S.C. §1301, which provides stay protection as to non-filing co-debtors in Chapter 13 cases.

The automatic stay applies only to claims that arose pre-petition and not post-petition claims. *In re Rodriguez*, 629 F.3d 136 (3rd Cir. 2010). To determine whether a claim is pre-petition or post-petition, most courts apply a "conduct test" whereby the date of the claim is determined by the date of the conduct giving rise to the claim. *St. Catherine Hosp. of Ind., LLC v. Ind. Family & Soc. Servs. Admin*. 800 F.3d 312 (7th Cir. 2015).

B. Circumstances Change Under Which Filing A Petition Does Not Trigger The Stay – 11 U.S.C. §362(B)

In general the filing of a petition will operate as an automatic stay, but there are certain circumstances set forth in 11 U.S.C. §362(b) under which the filing of a petition does not operate as a stay. The subsections which are relevant to secured creditors are discussed below.

Under §362(b)(3), the filing of a petition does not prevent a creditor from acting to perfect, or maintain or continue perfection of an interest in property if local law would allow such action but for the bankruptcy filing. For instance, a creditor's post-petition perfection of a purchase-money security interest does not

violate the automatic stay if the perfection is timely under state law. *See Sovereign Bank v. Hepner (In re Roser*), 613 F. 3d 1240 (10th Cir. 2010).

Under §362(b)(20), the filing of a petition does not stay any act to enforce any lien against or security interest in real property following entry of the order granting relief from stay in any prior case for a period of two years after entry of the prior order, except where the debtor in the subsequent case moves for relief from the prior order based on changed circumstances or for other good cause shown, after notice and a hearing.

Under §362(b)(21), the filing of a petition does not stay an act to enforce any lien against or security interest in real property if –(a) the debtor is ineligible to be a debtor under §109(g)(*i.e*. a 180-day bar for willful failure to abide by orders of the court); or (b) if the case was filed in violation of a prior court order prohibiting the debtor from being a debtor in another case.

To determine the application of the automatic stay as it pertains to lessors of real property, review §362(b)(22), §362(b)(23), §362(l), and §362(m).

C. Termination Of The Stay By Operation Of Law

The automatic stay remains in effect for a defined period of time. It does not remain in effect indefinitely. Therefore, a creditor who wants relief from the automatic stay may elect to do nothing and let the automatic stay be terminated by operation of law.

Although the debtor will eventually lose the protections of the automatic stay by operation of law under 11 U.S.C. §362(c), the impact of the loss is buffered once the individual debtor obtains a discharge of the debt at which time the debtor will have the benefit of the permanent injunction under 11 U.S.C. §524. Once a discharge is granted, a creditor is enjoined from commencing or continuing an action to collect, recover, or offset a debt as a personal liability of the debtor. 11 U.S.C. §524(a)(2).

Nonetheless, it is important to remember that the permanent injunction under §524(a) only prevents a creditor from pursuing a personal judgment against the individual debtor. Once the stay is lifted, the creditor is allowed to recover the collateral in accordance with state law. If the lien is not avoided nor paid in full, a creditor is entitled to recover its collateral in non-bankruptcy proceedings

regardless of whether the debt was discharged. *Redmond v. Fifth Third Bank*, 624 F.3d 793 (7th Cir. 2010).

If a party in interest wants to make sure the automatic stay is no longer in effect by operation of law, the party may request that the court issue an order under subsection (c) confirming that the automatic stay has been terminated. 11 U.S.C. §362(j).

1. **Property no longer property of the estate, discharge, case closing, case dismissal, and repeat filers – 11 U.S.C. §362(c)**

a. Relief from Stay When Property is No Longer Property of the Estate.

Under §362(c)(1), the stay against property of the estate continues until such property is no longer property of the estate. Under 11 U.S.C. §554(d), property is no longer property of the estate once it has been abandoned. Also, the confirmation of a plan may re-vest the property in the debtor under §1327(b), which could mean the collateral is then no longer property of the estate for purposes of §362(a)(3).

b. Relief from Stay When Case Closes, Case is Dismissed, or Discharge Granted.

Under §362(c)(2), the stay of any act under subsection (a) continues until the earliest of – the closing of the case; the dismissal of the case; or the time a discharge is granted or denied in a case concerning an individual.

It is important to remember that when a debtor receives a discharge the stay will be lifted as to the debtor but the stay as to the bankruptcy estate remains in effect unless otherwise lifted under another Code section or order of the court.

c. Repeat Bankruptcy Filers and the Automatic Stay.

Under §362(c)(3), when an individual debtor has two bankruptcy cases pending in a one-year period, the stay as to a debt or property securing such debt shall terminate with respect to the debtor on the 30th day after the filing of the later

case unless a party in interest moves for and obtains a court order extending the stay within the 30-day period.

Under §362(c)(4), when an individual debtor has more than two bankruptcy cases pending in a one-year period, no stay shall go in effect upon the filing of the later case unless within 30 days after the filing of later case a party in interest moves the court to impose the stay. Under both scenarios, the movant must demonstrate good faith as to the creditors subject to the stay.

It is important to note that §362(c)(3) mentions only the automatic stay as it relates to the individual debtor but not the property of the estate. Therefore, when there has been two cases pending in the same year and the debtor does not obtain an order extending the stay under §362(c)(3), there is no stay in effect as to the debtor after 30 days from filing but the automatic stay as to property of the estate remains in effect. *See In re Skoglund*, unpublished Memorandum of Decision and Order Regarding Motion to Continue Automatic Stay, Case no. 14-90050 - SWD (Bankr. W.D. Michigan, March 19, 2014).

d. Failure to Assume a Lease and Termination of the Stay– 11 U.S.C. §365(p)

Under 11 U.S.C. §365(p), if a lease of personal property is rejected and not timely assumed by the trustee, the leased property is no longer property of the estate and the stay is automatically terminated.

A Chapter 7 debtor who is an individual may assume a lease by notifying the creditor in writing. Upon being notified, the creditor may, at its option, notify the debtor that it's willing to have the lease assumed and may condition assumption on curing any default. §365(p)(2)(A). The stay under §362 and the injunction under §524(a)(2) shall not be violated by negotiations to cure under this section. §365(p)(2)(C).

A Chapter 13 debtor assumes a lease by providing for assumption in the plan and having the plan confirmed. If the lease is not assumed in the confirmed plan, it is deemed rejected at the conclusion of the confirmation hearing. Once the lease is rejected, the stay and co-debtor stay are terminated. §365(p)(3).

In a Chapter 7 case, a trustee must assume a lease within 60 days after filing of the petition or the lease is deemed rejected. 11 U.S.C. §365(d)(1). In a Chapter 13 case, a trustee may assume a lease at any time before confirmation of a plan. 11 U.S.C. §365(d)(2).

2. Personal property and Statement of Intention- 11 U.S.C. §362(h) and 11 U.S.C. §521

Under §362(h)(1), the stay is terminated with respect to personal property of the estate or of the debtor securing a claim or subject to an unexpired lease, and such property shall no longer be property of the estate if the debtor fails to timely file a statement of intention required under 11 U.S.C. §521(a)(2), or indicate in the statement that debtor will either surrender, reaffirm, or redeem, or fail to assume a lease and fails to take timely action as specified in the statement. If the debtor expresses an intention to reaffirm the debt but the creditor refuses to agree, the stay shall not be terminated under this subsection. Also, the trustee may move for a determination that the personal property is of consequential value. If the court grants such a motion, the stay shall not be terminated under this subsection.

In *In re Reed*, 2011 Bankr. LEXIS 4855, Case no. 10-67727 (Bankr. E.D. Mich. Dec. 14, 2011), a creditor sought relief from stay under §362(h) because the debtor had failed to file a statement of intention. The bankruptcy court denied the creditor's request on the grounds that the debtor had entered into a reaffirmation agreement that was timely filed. The court noted that stay relief under §362(h) occurs when the debtor both fails to timely file a statement of intention and fails to take timely action specified in such statement. "Only one of the said two deadlines was contravened in this case, so technically the stay lift was not automatically triggered." In addition, the court said the stay remained in effect regardless of the fact that the Reaffirmation Agreement was not approved by the court. Once a debtor enters into a reaffirmation agreement, the debtor satisfies the requirements of the Code even if approval is later denied.

D. Moving For Relief From The Automatic Stay – 11 U.S.C. §362(D)

A party in interest may request a court to grant relief from the automatic stay under 11 U.S.C. §362(d). In Chapter 7 and Chapter 13 cases, most creditors move for relief from stay to ultimately obtain possession of the collateral under state law. Before a creditor moves for relief from the automatic stay, the creditor should determine if such a motion is warranted. Also, the creditor must ensure that it has the necessary documents to show the creditor is an interested party and has a perfected security interest in the collateral.

In Chapter 13 and Chapter 7 cases, the most relevant part of §362(d) says:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if--
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization;
>
> * * *
>
> (4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either--
>
> (A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or
>
> (B) multiple bankruptcy filings affecting such real property. If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title

> may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

1. Legal standards to obtain relief from stay

To have standing to move for relief from stay as a "party in interest," courts tend to focus on who is entitled to enforce the obligation. *In re Rice*, 462 B.R. 651 (B.A.P. 6th Cir. 2011). A secured creditor has standing to seek relief from stay if the creditor can show it has an interest in the note and has been injured by the debtor's conduct including default on the note. *Id.* The movant also has the responsibility to show it has an interest in the property. *Id*.

Whether the debtor has equity in the property may be a determining factor in obtaining relief from stay. If there is equity, the courts may not be inclined to lift the stay even if the debtor fails to make plan payments. *Americredit Fin. Servs v. Nichols (In re Nichols),* 440 F.3d 850 (6th Cir. 2006). However, the issue of equity may not be as relevant when we are talking about mortgages on the principal residence. *See In re Fraiser*, Chap 13 case no. 14-06074-SWD, Memorandum of Decision and Order (Bankr. W.D. Mich., Fed. 20, 2015)(holding that the creditor was entitled to relief from stay regardless of equity cushion because the subject property was the debtor's residence and the debtor failed to pay which is an impermissible modification under 11 USC §1322(b)(5)).

2. What do the rules require to be filed with a motion for relief from stay?

Under Fed.R.Bank.P. 4001(a)(1), a motion for relief from stay shall be treated as a contested matter in accordance with Fed. R. Bankr. P. 9014.

LBR 4001-1(b) (E.D. Mich) says a motion for relief must attach a copy of all relevant agreements and documents establishing perfection of the security interest, including notes, assignments, mortgages, and UCC-1 financing statements. All exhibits must be redacted.

LBR 4001-1(b) (W.D. Mich) say a secured party seeking relief from stay by motion with notice and opportunity to object must attach to the motion documentary proof of its lien perfected in accordance with applicable law.

In Chapter 7 and Chapter 13 cases, most motions for relief from stay are filed with notice and opportunity to object. In addition to the documents showing a perfected security interest, the movant must attach: (a) a copy of the proposed order; (b) a notice of motion and opportunity to object; and (c) a certificate of service. *See* Fed. R. Bankr. P. 9014(a) applicable under Fed. R. Bank. P. 4001(a)(1); LBR 4001-1(b) and 9013(c) (W.D. Mich); LBR 4001-1 (a) and 9014-1(c) (E.D. Mich).

3. Contents of a motion for relief and response in opposition

LBR 4001-1(b)(E.D. Mich) says a motion for relief from stay must identify the property, state the names of interested parties, state the amount of the debt, and state the fair market value of the property.

The local rules in the Western District of Michigan do not have requirements regarding the contents of a motion for relief from stay, but the local rules do impose requirements on the party opposing the motion. Under LBR 4001-1 (W.D. Mich), a response to a motion for relief from stay must set forth with specificity the opposing party's good faith reasons for objection to the motion and for believing that relief from stay will be denied if a hearing is held.

4. Burden of proof

Under §362(g), the movant has the burden of proof as to the debtor's equity in the property and the party opposing the motion has the burden of proof on all other issues. However, a creditor should not be misled by the plain language of §362(g).

To prevail in a motion for relief from stay, a creditor must prove it has a valid security interest in the collateral as part of its burden to prove the debtor has no equity. *Grant, Konvalinka & Harrison, P.C. v. Still (In re McKenzie),* 737 F.3d 1034 (6th Cir. 2013)(on issues of first impressions, the Sixth Circuit: (a) required the creditor moving for relief from stay to provide the validity of its security interest rather than the trustee who opposed the motion; and (b) allowed the trustee to

use his hypothetical lien-creditor status and avoidance powers to oppose the motion for stay relief regardless of the expiration of the statute of limitations).

When a motion for relief is contested, the movant must show a *prima facie* case, or cause, which will place a burden on the opposing party to show the movant's security interest is adequately protected. If the movant fails to make a *prima facie* case, the motion should be denied without requiring the opposing party to present proofs. *In re Spencer*, 568 B.R. 278 (Bankr. W.D. Mich. 2017)(denying the creditor's motion for relief from stay which was not supported with any evidence).

5. Debtors Who Assert a Loan Modification Application as a Defense to a Motion for Relief from Stay

It is not unusual for a debtor to oppose a creditor's motion for relief from the stay on the grounds that the debtor is in the process of applying for a loan modification. In a Chapter 7 case, such a defense is generally ineffective because the stay will likely be lifted by operation of law in a relatively short period of time (regardless of whether the creditor's motion is granted) and the Chapter 7 debtor is not attempting to reorganize her or his debts but rather is seeking a more immediate fresh start and discharge. More importantly, lifting of the automatic stay sometimes makes it easier for a debtor to work with a creditor on a loan modification, as there will be no concerns that the loan modification process is an effort to collect the debt in violation of the stay.

In contrast, a Chapter 13 debtor may have more success than a Chapter 7 debtor opposing a motion for relief from stay by arguing that she or he is in the process of applying for a loan modification. When a debtor raises such a defense, the debtor should be prepared to demonstrate he or she is actively pursuing a loan modification. For instance, a debtor in the Eastern District of Michigan may move the court to review the loan modification process. See the sample forms approved by U.S. Bankruptcy Court for the Eastern District of Michigan for a Debtor's Motion Requesting Mortgage Modification Review, and an Order Granting Debtor's Motion Requesting Mortgage Review which can be found on the court's website www.mieb.uscourts.gov. A creditor may have difficulty obtaining relief from stay if the debtor has obtained an order that provides for the bankruptcy court's review of the loan modification process.

E. Differences In Chapter 13 Compared To Chapter 7

Chapter 13 cases impose a co-debtor stay unlike in Chapter 7 cases. See 11 U.S.C. §1301. Creditors should check to see if there's a non-filing co-debtor and be sure to seek relief from the co-debtor stay in Chapter 13 cases.

In Chapter 13 cases, a creditor must first determine how the debtor proposes to treat the secured claim in the plan. If the plan has not been confirmed, a motion for relief from stay may be premature unless there is a substantial plan payment delinquency and it does not seem likely that the plan will be confirmed.

In both the Eastern and Western Districts of Michigan, the model Chapter 13 plan provides for relief from stay at confirmation as to collateral the debtor proposes to surrender. In the Western District (unlike the Eastern District), the model plan does not lift the co-debtor stay at confirmation for plans which provide for surrender of the collateral. Accordingly, a creditor may need to file a motion for relief from stay even if the confirmed plan provides for surrender.

If the plan has been confirmed, a creditor should determine if the debtor has complied with the terms of the confirmed plan before moving for relief from stay. If the plan provides for the creditor to receive disbursements via the trustee conduit, the creditor must review the trustee's records to determine if there is a plan payment delinquency and/or a post-petition delinquency owed to the creditor. Sometimes a delay in payments to a creditor is a temporary situation as a result of the order of payments provided for in the confirmed plan rather than a sign that the plan is infeasible or that the debtor is not making plan payments.

In Chapter 7 cases, the creditor should review the case docket on PACER to see if the Chapter 7 Trustee intends to liquidate the property, void the mortgage, or abandon the property. If the Chapter 7 Trustee wants time to try to sell the property, the creditor will most likely seek an agreement with the Trustee providing for a date certain as to when the property will be sold or the creditor shall be granted relief from stay.

F. Impact Of Obtaining Relief From Stay

Once relief from stay is granted, a creditor is permitted to pursue its legal remedies as to the collateral under state law (*i.e.* foreclosure and/or repossession).

It is important to remember that relief from stay does not bar a debtor from making (purely) voluntary payments to avoid a foreclosure or repossession. *See* 11 U.S.C. §524(f). Likewise, a debtor is free to apply for a loan modification.

There is a split of opinion as to whether a conversion to another chapter will trigger a new stay after the creditor obtained an order granting relief from stay. *See* 11 U.S.C. §348 (effects of conversion); *In re State Airlines*, 873 F.2d 264 (11th Cir. 1989) (conversion does not trigger stay); *In re Materson*, 189 BR 250 (Bankr. D.R.I. 1995)(conversion does not trigger stay); *In re Parker*, 154 BR 240 (Bankr. S.D. Ohio 1993)(conversion from one chapter to another does not automatically re-impose the stay). Most of the bankruptcy judges in Michigan (both Eastern and Western Districts) will sign a form of Order Granting Relief from Stay that says the order shall remain in effect in the event of a conversion.

G. What Acts Do And Do Not Constitute A Stay Violation?

The automatic stay prohibits actions taken *against* a debtor but does not prohibit actions taken by a debtor. Similarly, a creditor who merely responds to a debtor's inquiry does not violate the stay. *See Redmond v. Fifth Third Bank*, 624 F.3d 793 (7th Cir. 2010)(holding that a creditor who issued a payoff letter had not violated the automatic stay).

A creditor's actions taken within the context of a bankruptcy case are generally determined not to be violations of the automatic stay. For instance, the filing of a proof of claim is allowed under 11 U.S.C. §501(a) and is not deemed to be a violation of the automatic stay. *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348, 353 (5th Cir. 2008). Likewise, the filing of adversary proceedings seeking a determination that a debt is non-dischargeable is allowed under the Bankruptcy Code and is not a violation of the automatic stay. *Cowin v. Countrywide Home Loans (In re Cowin)*, 864 F.3d 344 (5th Cir. 2017).

A creditor's attempt to obtain a reaffirmation agreement under 11 U.S.C. §524(c) does not violate the stay as long as the creditor does not engage in coercion or harassment. *Pertuso v. Ford Motor Credit Co*., 223 F.3d 417 (6th Cir. 2000)(a course of conduct violates §362(a)(6) if it could reasonably be expected to have a significant impact on the debtor's decision to repay, and is contrary to what a reasonable person would consider to be fair). Likewise, a secured creditor's acceptance of voluntary payments does not violate the automatic stay as long as the payments were not improperly induced. *Id.*

Moreover, there's no stay violation when a creditor withholds a reaffirmation agreement on a secured debt on the condition that the debtor also agrees to reaffirm unsecured debts. *Jamo v. Katahdin Fed. Credit Union (In re Jamo)*, 293 F.3d 392 (1st Cir. 2002).

One court has ruled that the inclusion of a pre-petition escrow shortage in the post-petition continuing monthly mortgage payments constitutes a violation of the automatic stay. *In re Rodriguez*, 629 F.3d 136 (3rd Cir. 2010) (determining that the unpaid escrow cushion constitutes a "claim" that should be part of the proof of claim), *cert. denied* 132 S. Ct. 573 (2011).

Merely ministerial acts are not subject to the automatic stay. *Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969 (1st Cir. 1997). However, a post-petition entry of a default judgment was found to be a judicial act (not a mere clerical act) and in violation of the stay despite the fact that the creditor's request for the judgment had been made pre-petition. *Id*.

The post-petition recording of an assignment of mortgage does not violate the automatic stay. *Rogan v. Bank One, N.A. (In re Cook)*, 457 F3d 561 (6th Cir. 2006)(an owner of a mortgage may transfer its interest after the mortgagor files for bankruptcy).

Courts have held that adjournments of a foreclosure sale, after a bankruptcy case is filed, do not violate the automatic stay. *Stein v. U.S. Bancorp*, 2011 U.S. Dist. LEXIS 18357 at 19-20 (E.D. Mich. Feb. 24, 2011); *Worthy v. World Wide Financial Services, et. al.*, 347 F. Supp. 2d 502 (E.D. Mich. 2004), *aff'd*, 192 Fed. Appx. 369 (6th Cir. 2006)(postponing the sale merely maintains the status quo).

H. What Are The Consequences Of A Stay Violation?

1. Damages

Section 362(k) provides for recovery of damages for violations of the automatic stay as follows:

> (1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.
>
> (2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

Under §362(k), an individual debtor seeking to recover damages has the burden of establishing by the preponderance of the evidence that there were actions taken in violation of the automatic stay, the violation was willful, and the violation caused actual damages. *Moore v. Nunnari (In re Moore),* 2009 Bankr. LEXIS 4544 (Bankr. N.D. Ohio 2009). A violation is "willful" so long as the creditor had notice of the bankruptcy filing. *Id*. An award of damages must be support by evidence rather than conjecture and speculation. *Id*.

If there was a stay violation, a court should consider whether the violation was harmless. The following questions are pertinent: (a) Would the bankruptcy court have lifted the stay had the creditor made the request? (b) If so, would the outcome be the same? (c) Was the debtor prejudiced by the court's failure to lift the stay? *Cowin v. Countrywide Home Loans (In re Cowin)*, 864 F.3d 344 (5th Cir. 2017).

Some courts have determined that actual damages include emotional distress damages. *Lansaw v. Zokaites (In Re Lansaw),* 853 F.3d 657 (3rd Cir. 2017). However, a federal district court in the Sixth Circuit rejected the argument that

emotional damages qualify as actual damages under §362(k)(1). *United States v. Harchar*, 331 B.R. 720 (N.D. Ohio 2005).

2. A Creditor May Seek to Annul the Stay

Most courts hold that actions taken in violation of the automatic stay are void as opposed to being voidable. *Easley v. Pettibone Mich. Corp*., 990 F.2 905 (6th Cir. 1993). However, the Sixth Circuit has held that acts in violation of the stay are voidable. In *Easley*, the Sixth Circuit held that actions taken in violation of the stay are best described as invalid and voidable considering that the bankruptcy court is given permission to retroactively annul the stay under §362(d). Thus, a creditor who has taken actions in violation of the stay may ask the bankruptcy court to retroactively annul the stay under §362(d) to ensure that said acts will not be deemed to be void. *Moore v. Nunnari (In re Moore),* 2009 Bankr. LEXIS 4544 (Bankr. N.D. Ohio 2009).

II. REAFFIRMATION AGREEMENTS

A. Form of the Reaffirmation Agreement

Reaffirmation of debt by individual debtors is heavily regulated under the Bankruptcy Code because of the impact of reaffirmation on the fresh start. The detailed contents of a Reaffirmation Agreement, including the agreement itself, required disclosures and certain certification and supporting information, are expressly set forth in the statute. 11 U.S.C. §524(k). Those statutory contents have been formulated into two alternative Directors Forms, Form B2400A and B2400A/B Alt. The possible outcomes of the reaffirmation agreement process are neatly summarized in the Directors Form orders for Reaffirmation Agreements, B2400C and B2400C Alt. It is a critical requirement of the statute that a Reaffirmation Agreement, including a form cover sheet, must be filed with the court in order to be enforceable. 11 U.S.C. §524(c)(3); Fed. R. Bankr. P. 4008(a). While a debtor may voluntarily repay any debt even in the absence of a reaffirmation agreement, 11 U.S.C. § 524(f), repayment must be truly voluntary. Pretending that there is a reaffirmation agreement when there is not one actually filed with the court exposes the creditor to liability, as Sears discovered in 1999 in agreeing to pay a $60 million fine in a bankruptcy fraud action involving a pattern and practice of unfiled reaffirmation agreements and aggressive post-petition collection efforts. *See*

In re Latanowich, 207 B.R. 326 (Bankr. D. Mass, 1997)(the case that started it all against Sears).

1. *In re Quintero*, 2006 Bankr. LEXIS 906 (N.D. Cal. 2006). Court refused to approve a reaffirmation agreement wherein the creditor failed to include the required disclosures and as a result of the creditor's error, the court ruled that the creditor was not permitted to repossess car.

2. *In re Strathres*, Case No. 10-55413 (Bankr. E.D. Mich. 2010) - Court denied approval of reaffirmation agreement that did not contain an adequate description of the reaffirmed debt repayment schedule.

B. Timing: Reaffirmation Agreement Must Be "Made" Prior To Discharge

1. 524 (c)(1) provides that in order for a reaffirmation agreement to be valid, it must be **"made"** before the granting of discharge.

2. What does "made" mean?

a. *In re Piontek*, Case No. 09-70632 (Bankr. E.D. Mich. 2010). The debtor failed to return the reaffirmation agreement to the creditor until after the court had issued the discharge. The court ruled that the reaffirmation agreement was not valid as it was not "made" prior to discharge because all parties had not yet signed the document when the discharge was entered.

b. *Pickerel v. Household Realty Corp*., 2010 WL 2301190 (Bankr. N.D. Ohio 2010). A reaffirmation agreement signed prior to entry of discharge but not filed with Court until after discharge is binding and enforceable reaffirmation agreement.

c. *In re Stewart,* 355 B.R. 636 (Bankr. N.D. Ohio 2006). The court decided that the discharge cannot be set aside for the purpose of filing a reaffirmation agreement entered into after discharge.

C. Approval Requests: Pro Se Debtors and Debtors Unrepresented as to the Reaffirmation Agreement.

If a debtor is *pro se*, or if a debtor's lawyer refuses to sign the certification on the Reaffirmation Agreement form, the court must hold a hearing on the Reaffirmation Agreement at which the debtor must appear in person for the Reaffirmation Agreement to be enforceable. 11 U.S.C. § 524 (c)(b)(A), (d). The purpose of the hearing is different, however, depending on whether the collateral is personal property or real property. If the collateral is personal property, the court must affirmatively approve the Reaffirmation Agreement in order for it to be enforceable. 11 U.S.C. § 524 (a)(6)(B), 524 (d)(2). If the collateral is real property, the court's function is limited to informing the debtor of certain legal circumstances as to consequences of the Reaffirmation Agreement. 11 U.S.C. § 524 (d)(1).

D. Discharge is Not the Only Timing Issue. Don't Forget Bankruptcy Rules 4004 and 4008.

1. Rule 4008(a) requires reaffirmation agreements to be filed not later than 60 days after the first date set for the 341 hearing.

2. Rule 4008 also allows the Court to, "at any time and in its discretion," enlarge the time to file a reaffirmation agreement.

a. Some courts require the parties to seek the extension of time prior to the time period expiring and some do not—know your judge.

3. Rule 4004 provides a mechanism to delay entry of discharge at the request of the debtor.

E. Debtor Did Not Reaffirm. Now What?

1. Voluntary Payments--§524(f) permits the debtor to make voluntary payments on any discharged debt.

2. 524(l) states that "notwithstanding any other provision of this title, the following shall apply"

a. A creditor may accept payments from the debtor before and after the filing of an agreement of the kind specified in subsection (c) with the court;

b. A creditor may accept payments from a debtor under such agreement that the creditor believes in good faith to be effective;

c. The requirements in subsections (c)(2) and (k) shall be satisfied if the disclosures required under those subsections are given in good faith.

3. Courts often deny requests to set aside a discharge to allow a debtor to enter into a reaffirmation agreement.

a. *In re Smith*, Chapter 7 case no. 11-35051, 2012 WL 441322 (Bankr. N.D. Ohio Feb. 2, 2012)(Judge Whipple, denying debtor's request to vacate a discharge in order to enter into a reaffirmation agreement).

b. *In re Stewart,* 355 B.R. 636 (Bankr. N.D. Ohio 2006)(court denied motion to revoke discharge to allow for reaffirmation agreement; court concluded it could only invoke 11 USC 105(a) if an equitable remedy was necessary which it was not).

c. *In re Smith*, Chapter 7 case no. 11-05665-SWD (Bankr. W.D. Mich. March 8, 2012)(court denied debtors' motion to set aside a discharge so that the debtors may enter into a reaffirmation agreement).

F. Is There a Fourth Option as an Alternative to Reaffirmation, Redemption or Surrender of Collateral?

1. Prior to BAPCPA some circuits allowed a "pay & drive" or 4th Option—*i.e,* the debtor could keep the car without a reaffirmation agreement if they made the payments.

2. What happens if the debtor does not reaffirm, redeem or surrender?

a. *Ford Motor Credit Co v Hall*, ___F Supp 3d___; 2017 U.S. Dist. LEXIS 112890 (E.D. Mich. July 20, 2017). After disapproving the reaffirmation agreement the Bankruptcy Court sua sponte prevented the creditor from repossessing the vehicle with a payment default—effectively creating a judicially endorsed 4th Option. The District Court held, "Certain United States Courts of Appeal that have addressed the issue have held that Congress eliminated the "ride-through" when it enacted the Bankruptcy Abuse Prevention and Consumer Protection Act ("**BAPCPA**"), Pub.L. No. 109-8, 119 Stat. 23, in 2005. *See, e.g., In re Jones*, 591 F.3d 308, 310-12 (4th Cir. 2010) (analyzing various provisions added to the United States Bankruptcy Code by BAPCPA and concluding that they eliminated the "ride-through" option permitted in some circuits prior to BAPCPA); *In re Dumont*, 581 F.3d at 1112-18 (9th Cir.)(same). This Court recognizes that some District Court and Bankruptcy Court decisions have approved a "ride-through" option. *See, e.g., In re Baker*, 400 B.R. 136, 139 (D. Del. 2009); *Coastal Fed. Credit Union v. Hardiman*, 398 B.R. 161 (E.D.N.C. 2008). This Court rejects that option because it was specifically rejected by Congress in 2005. Appellant argues that the Bankruptcy Court overstepped its authority in this case in *sua sponte* rewriting the contract between the parties, and issuing an injunction without notice. This Court agrees with Appellant."

b. *In Re Dumont*, Case No. 08-60002 (9th Cir. 2009). The 9th Circuit Court of Appealsnoted that §362(h), in conjunction with §521(a)(2), now mandate that the debtor perform the stated intention. The court limited its ruling to those cases where the debtor refused to sign a reaffirmation agreement.

c. *In re Jones*, Case No. 08-2177, (4th Cir. 2010). The 4th Circuit reversed its prior decision in *In re Belanger*, 962 F.2d. 345 (4th Cir. 1992), if the debtor states the intention to reaffirm the obligation, then the debtor must enter into a reaffirmation agreement within 30 days from the date first set for the 341 meeting or the automatic stay will be vacated and the property will no longer be property of the estate. The court also recognized the general rule that an ipso facto clause is generally unenforceable; however, the amended §521(d) now allows for an exception to that rule when the Debtor fails to comply with §521(a) and §362(h).

d. *Dennis W. Hall v. Ford Motor Credit Company LLC*, Case No. 103, 370 (Supreme Court of Kansas, 2011). The debtor filed a chapter 7 bankruptcy and did not reaffirm the obligation with Ford Credit. Due to the absence of a reaffirmation agreement, Ford Credit attempted to repossess the vehicle. The debtor appealed. Kansas' version of the Uniform Consumer Credit Code allows a creditor to enforce the default provisions of a consumer credit transaction only if a payment default exists or if the creditor can establish the prospects of payment, performance, or realization of collateral is significantly impaired. The Kansas Supreme Court ruled that the filing of the bankruptcy alone is not enough to satisfy the significant impairment test; however, the debtor's failure to respond to Ford Credit's requests to reaffirm the obligation, the entry of the discharge that shifts all the risk to the creditor, the inability of the creditor to contact the customer, and the fact that the vehicle was worth less than the amount still owed on

the contract, did create a significant impairment justifying repossession even when the account was current.

e. *Ford Motor Credit Company LLC v. Maureen P. Roberson (In re Roberson).* The Bankruptcy Court certified the question of whether a creditor can repossess the vehicle if the account is current when the customer files bankruptcy and does not reaffirm the debt to the Maryland Court of Appeals. The Maryland Court of Appeals decided that a creditor can repossess a car when the customer files bankruptcy and does not reaffirm the debt. The state law prohibited acceleration of the debt, but not repossession when the creditor deemed itself "insecure". "Insecurity" is defined 'having a good faith belief that the possibility of receiving payment or performance from another party to a contract is unlikely.'"

G. Different Rule for Credit Unions Under 11 U.S.C. §524(m)

The court has the authority and discretion to disapprove a Reaffirmation Agreement as an undue hardship after notice and a timely hearing. 11 U.S.C. §524(m). But if the creditor is a credit union as defined by 19(b)(1)(A)(iv) of the Federal Reserve Act, §524(k)(5)(B), the certification that if a presumption of undue hardship exists, in the opinion of the attorney the debtor is able to make the payments, means that §524(m) (court review of presumption and potential disapproval) do not apply. But if the Reaffirmation Agreement is not signed by counsel or if the Debtor is pro se, and the collateral is personal property, a hearing is still required even if a credit union is involved, and the court may still decline to approve the agreement.

1. Courts do not need to review the Reaffirmation Agreement to determine if the presumption of undue hardship exits or if it has been rebutted, and indeed cannot disapprove it on that basis if debtor is represented by counsel in negotiation of the agreement or if the collateral is real property.

2. The Statement in Support must read, 'I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.' §524(k)(6)(B).

H. Mortgage--Related Issues

1. *In re Smith*, 467 BR 122 (Bankr. W.D. Mich. 2012). Debtors' alleged uneasiness at not having reaffirmation agreement with residential mortgage lender and possible foreclosure if debtors default in post-petition payments did not warrant setting aside discharge order. Section 105 does not provide basis to disregard or limit or expand express statutory provisions. Court must exercise equitable powers only within the confines of the Code and to carry out, but not countermand, provisions of Title 11

2. If the debtor fails to reaffirm the mortgage, does the debtor lose the opportunity to refinance or obtain a loan modification in the future?

a. *Smith v. First Suburban National Bank (In re Smith)*, 224 BR 388 (N.D. Ill. 1998). The debtor did not sign a Reaffirmation Agreement, but refinanced the home loan with the bank. The refinance is a new promise to pay; however, it included at least a portion of the pre-petition, discharged debt. The court determined the bank violated the discharge injunction by accepting payments and mailing monthly statements on the new note.

b. *Minster State Bank v. Heirholzer (In re Heirholzer)*, 170 BR 938, (Bankr. N.D. OH. 1994). The court ruled that the lender's agreement not to foreclose on the property in exchange for a post-discharge promissory note was sufficient consideration making the new loan enforceable.

III. LEASE ASSUMPTION AGREEMENTS

Section 365 allows a lessor and the debtor to assume a lease. The lease assumption must be in writing, and lessors may condition the assumption on the debtor curing any defaults.

A. Do You Need a Reaffirmation Agreement?

1. The minority approach

In *Thompson v. Credit Union Financial Group (In re: Thompson)*, 453 B.R. 823 (W.D. Mich. 2011), the lessor and the debtor signed a lease assumption agreement. Prior to the expiration of the lease and the entry of the discharge, the debtor surrendered the vehicle. After the entry of the discharge, the lessor filed a lawsuit in the State Court to collect the debt and the lessor obtained a Default Judgment against the debtor. The debtor reopened the bankruptcy case and filed a Motion for Contempt asserting the lessor violated the discharge injunction by collecting on the lease debt that was not reaffirmed according to §524(c). The Bankruptcy Court denied the debtor's motion and ruled that a §524 reaffirmation agreement was not required to assume a lease pursuant to §365(p) and that the assumed lease became a post-petition liability that was not subject to discharge. The Debtor then appealed the ruling to the United States District Court for the Western District of Michigan.

> The District Court reversed the Bankruptcy Court. The court noted "[a]uthority is limited, but multiple courts have held … that a debt assumed under 365(p) falls within the scope of the discharge injunction unless there has been a court approval of the assumption, under 524(c) or otherwise." The District Court cited the following cases:
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> ° *In re Eader*, 426 B.R. 164, 166 (Bankr. Md. 2010) (concluding that "although [s]ection 365(p)(2) permits an individual debtor in a Chapter 7 case to assume a lease of personal property and that such assumption does not require any approval by the bankruptcy court, the personal obligation of the debtor under the assumed agreement is subject to the discharge provided

by [s]ection 524(a) unless the debtor reaffirms the indebtedness under the lease in compliance with [s]ection 524(c) *et seq*.");

- *In re Creighton*, 427 B.R. 24, 28 (Bankr. Mass. 2007) ("It would thus appear that an assumption agreement negotiated and entered into under § 365(p)(2), when not otherwise excepted from discharge by § 523(a), is an agreement to which § 524(c) pertains; it is a species of reaffirmation agreement.").

The District Court did not specifically require a §524 reaffirmation agreement, but it does require more than the filing of a lease assumption agreement. The court stated, "if the parties desire to enter into a 365(p) assumption post-discharge, when a reaffirmation under 524(c) is ordinarily not possible, the parties could petition for entry of a nunc pro tunc order, could move for judicial approval under 365(a)…or could seek to have the matter reopened in a way that would permit appropriate relief. Section 524(c) need not be an exclusive route to a discharge avoiding assumption of liability under 365(p)."

2. The majority approach: the reaffirmation requirements of §524(c) do not apply to leases assumed in Chapter 7 cases pursuant to § 365(p).

Williams v. Ford Motor Credit Company LLC, 2016 U.S. Dist. LEXIS 62404 (E.D. Mich.): "[t]his Court agrees with those courts that have enforced lease assumption agreements under Section 365(p) even without reaffirmation under Section 524(c). Section 365(p) specifically addresses lease assumption agreements and does not expressly require that the underlying debt be reaffirmed under Section 524(c). Requiring such reaffirmation would be adding a step that Congress chose not to include; would strip Section 365(p) of its independent significance; and would create anomalous results. For all of these reasons, the Court concludes that a lease assumption agreement that complies with Section 365(p) is enforceable following discharge even if the debt that is the subject of the agreement was not reaffirmed under Section 524(c). Thus, in this

appeal, the Agreement is valid even without reaffirmation under Section 524(c) *if* it complies with Section 365(p)"

In re Starline Jackson, Case No. 06-44335 (Bankr. E.D. Mich. 2006)(J. Shefferly). The Bankruptcy Court found that a lease assumed under §365(p) does not require a reaffirmation agreement. §365(p) does not specifically mention any of the rights and disclosures required for a §524 reaffirmation agreement. The court also reviewed other provisions of the Bankruptcy Code to determine whether §365(p) incorporated §524. Specifically, the court noted that §362(h)(1)(A), addressing the effect of the failure of a Chapter 7 debtor to timely file a statement of intention, clearly differentiates the act of reaffirming a debt under §524(c) and assuming an unexpired lease under §365(p). Therefore, the court reasoned, reaffirming a pre-petition debt is a wholly separate act from assuming a lease.

In re Gundy, Case No. 07-57777 (Bankr. E.D. Mich. 2008)(J. Tucker). The court ruled that a §524 Reaffirmation Agreement was not required and that a lease assumption agreement does not need to be filed with the court.

IV. PROOFS OF CLAIM

A. What is a Proof of Claim?

1. The Bankruptcy Rules define a proof of claim as "a written statement setting forth a creditor's claim" and must substantially conform to the appropriate official form. Fed. R. Bankr. P. 3001; *see* 11 U.S.C. §501; Official Forms B 410, B 410A, B 410S-1, and B 410S-2.

2. A proof of claim filed in accordance with the rules constitutes prima facie evidence of validity and as to the amount of the debt, Fed. R. Bankr. P. 3001(f), and is deemed allowed in the absence of an objection, 11 U.S.C. § 502(a).

3. The following may file a proof of claim under 11 USC § 501:
   a. A creditor
   b. The debtor on the creditor's behalf

c. An entity liable to the creditor with the debtor
d. A trustee

4. Effective December 1, 2017, secured creditors must file a proof of claim to have their client's claim allowed. *See additional materials regarding rule changes.*

5. The filing of a claim that is time barred does not violate the Fair Debt Collection Practices Act. *See generally Midland Funding, LLC v. Johnson,* 137 S. Ct. 1407, 197 L. Ed. 2d 790 (2017) (creditor that filed a bankruptcy proof of claim which was clearly barred by the statute of limitations did not violate the federal Fair Debt Collection Practices Act since the debt fell within the bankruptcy definition of a claim as a right to payment, and the unenforceability of the claim did not constitute the assertion of any false, deceptive, or misleading representation, or use of any unfair or unconscionable means, to collect or attempt to collect the debt).

B. When Must the Proof of Claim be Filed?

1. Amendments to the Bankruptcy Rules Effective Dec. 1, 2017

a. A proof of claim in a voluntary Chapter 7, 12 or 13 case must be filed no later than 70 days after the order for relief. *See* Amended Rule 3002(c) (changing the date from 90 days after the § 341 meeting). A proof of claim in an involuntary Chapter 7 case must be filed not later than 90 days after the order for relief. *Id*.

b. Creditors with a security interest in the debtor's principal residence have additional time to file attachments to proofs of claim in compliance with Rule 3001(c)(1) (a copy of the writing on which the claim is based) and Rule 3001(d) (evidence of perfection), each of which must be filed no later than 120 days after the order for relief. *See* Amended Rule 3002(c)(7).

c. The following exceptions to complying with the new proof of claim bar date apply: (1) on a motion filed by a creditor before or after the filing deadline, the court may extend the deadline by not more than 60 days if the court finds insufficient notice because (i) the debtor failed to timely file the list of creditors' names and addresses required by Rule 1007(a), or (ii) notice was mailed to the creditor at a foreign address. *See* Amended Bankruptcy Rule 3002(c)(6).

2. What if you cannot file a proof of claim within the new deadline?

a. Consider an Informal Proof of Claim argument

The Informal Proof of Claim doctrine was judicially created "to alleviate problems with form over substance; that is, equitably preventing the potentially devastating effect of the failure of a creditor to formally comply with the requirements of the Code in the filing of a Proof of Claim, when, in fact, pleadings filed by the party asserting the claim during the claims filing period in a bankruptcy case puts all parties on sufficient notice that a claim is asserted by a particular creditor." *Barlow v. M.J. Waterman & Assocs.* (*In re M.J. Waterman & Assocs.*), 227 F.3d 604, 609 (6th Cir. 2000).

i. To be recognized, an informal proof of claim must be: (1) a writing, (2) that contains a demand on the estate, (3) expressing debtor's liability, and (4) filed with the court before the bar date. *PCFS Fin. v. Spragin* (*In re Nowak*), 586 F.3d 450, 455 (6th Cir. 2009). In large part, these requirements serve to mimic the requirements contained in formal proofs of claim under Federal Bankruptcy Rule 3001 and equivocate the notice an interested party would receive through a formal proof of claim. *In re Gee,* 2014 Bankr. LEXIS 132, 2014 WL 172334 (Bankr. N.D. Ohio, 2014).

ii. *Deutsche Bank Nat'l Trust Co. v. Cintron* (*In re Cintron*), 2017 Bankr. LEXIS 355 (Bankr. D. Conn. 2017): Although a bank that served as trustee for a home loan trust did not file a formal proof of claim in a debtor's Chapter 13 bankruptcy case by the claims bar date, it did file an objection to the debtor's plan before the bar date and indicated in its objection that it would file a claim seeking payment of arrears the debtor owed on a secured debt and the balance of the debt. The court held that the bank's objection met the four-part test courts in the Second Circuit used when determining whether a timely-filed document could be treated as an informal proof of claim.

b. Work with the debtor (11 USC § 501)

i. Under 11 USC 501(c) a debtor or the trustee may file a proof of claim if the creditor fails to do so.
ii. Avoids hardship by the debtor at the end of the plan
iii. Doesn't trigger Rule 3001(d) possible restrictions for having failed to attach required information.

C. What Documentation is Required for Secured Claims?

1. Failure to file a proof of claim does not affect the validity of any lien or security rights the creditor may have in the collateral. Bankruptcy Code § 506(d). Nevertheless, it often is advisable to file a proof of claim with proper documentation, especially if the creditor wishes to participate in distributions from the estate or plan. *See In re Tarnow,* 749 F.2d 464, 465 (7th Cir. 1985) (if there is doubt as to whether the collateral is adequate to satisfy the debt, creditor might want to file a proof of claim so that he will have a claim against the estate for the shortfall).

2. Bankruptcy Rule 3001(c) provides that "[w]hen a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim." If the writing has been lost or destroyed, a statement should be attached explaining the circumstances giving rise to the loss of the writing.

3. Bankruptcy Rule 3001(d) states that "[i]f a security interest in property of the debtor is claimed, the proof of claim should be accompanied by evidence that the security interest has been perfected." *See In re Immerfall,* 216 B.R. 269, 272 (Bankr. D. Minn. 1998) (creditor asserting security interest in property has burden of producing documentary proof of secured status). Thus, the proof of claim should be accompanied by the documents that support the secured claim, such as promissory notes, mortgages and security agreements, as well as satisfactory evidence that the security interest was perfected (*i.e*. a vehicle title/ RD-108 showing creditor's lien, a copy of a financing statement stamped as received by the secretary of state, or recorded mortgages).

a. Official Form B 410 also directs creditors to attach an itemized statement if their claim includes "interest or other charges" in addition to the principal amount of the claim, which would apply to nearly all secured claims, as these obligations bear interest.

b. Official Form B 410A is required if the obligation is secured by the debtor's principle residence.

i. Details a loan history that reveals when payments were received, how they were applied, when fees and charges were incurred, and when escrow charges were satisfied.

D. Objections to Claims

1. In the absence of an objection, a claim is deemed allowed. 11 U.S.C. §502(a). The party objecting to a claim has the initial burden of going forward and presenting evidence to overcome the prima facie showing of validity made by the proof of claim. *See In re Allegheny Int'l, Inc.*, 954 F.2d 167, 173-74 (3d Cir. 1992) ("In practice, the objector must produce evidence which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency."). Once the objecting party satisfies this burden of going forward, the burden shifts to the creditor to prove the validity and amount of its claim, unless the objecting party would have had the burden of proof outside of

bankruptcy, in which case the burden of proof remains with the objecting party. *See also In re Premo*, 116 B.R. 515 (Bankr. E.D. Mich.,1990)

2. According to the amended rules, the claim objection and notice must be served by first-class mail to the person designated on the creditor's proof of claim. *See* Amended Rule 3007(a)(2) (new provision). Objections to claims of an insured depository institution must also be served as provided by Rule 7004(h) (certified mail addressed to a designated officer of the institution).

3. Hearings on claims objections are not mandatory. *See* Amended Rule 3007(a)(1).

a. Be mindful of Eastern District of Michigan Local Rule 3007-1 regarding procedure and notice requirements.

4. In *In re Burkett*, 329 B.R. 820, 824 (Bankr. S.D. Ohio, 2005), the trustee claimed that the creditor provided only a short summary of the purported balance on the date of filing. The court found the trustee's objection to be without merit because an objection based solely on lack of documentation or deviation from official form and Fed. R. Bankr. P. 3001 did not provide a substantive basis for disallowing the claims where the debtor acknowledged the claims as legitimate debts in his schedules. The court found that 11 U.S.C.S. § 502 did not authorize the court to disallow a claim based on just "lack of supporting documentation."

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